No. 91-2084

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN VILD,

Petitioner,

v.

DOMINIC A. VISCONSI et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

John Vild sought to recover damages for mail and wire fraud subject to civil sanctions under RICO, 18 U.S.C. s.1961, et. seq. The Court of Appeals for the Sixth Circuit dismissed the claim for failure to establish "a pattern of racketeering activity." This litigation raises an important, unsettled, and recurring issue:

Does the requirement that the plaintiff in a civil RICO action allege a "pattern of racketeering activity" require that the plaintiff show injury from each act of racketeering activity in the pattern?

In conflict with four Circuit Courts of Appeal, the Court of Appeals for the Sixth Circuit held in the affirmative on both issues.

This Petition seeks review of this decision.

LIST OF PARTIES

The following parties appeared below.

Party Plaintiff:

John Vild

Parties Defendant:

Dominic Visconsi

Patricia Sattenfield

Sea/Mountain Resorts, Inc.

C. W. Sattenfield

Gerald Plonski

John Does

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES CITED	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT This Court Should Grant A Writ of Certiorari To Review The Court Of Appeals' Decision Since It Is In Direct Conflict With Controlling Decisions Of Other Courts Of Appeal, And With The Teachings of This Court.	7
CONCLUSION	24

TABLE OF AUTHORITIES CITED
CITED

CASES: PAGE NO.

Agency Holding Corp. v. Malley, Duff & Associates, 483 U.S. 143 (1989) 9

Banks v. Wolk, 918 F.2d 418 (3d Cir. 1990) 13, 14, 16

Durham v. Business Management Associates, 847 F.2d 1505 (11th Cir. 1988) . . . 14

H.J. Inc., et al., v. Northwestern Bell Telephone Company, 109 S.Ct. 2893 (1989 . . . . . 9, 10, 11, 14, 16, 19, 20, 23

Kerr-McGee Refining Corporation v. M/T Triumph, 924 F.2d 467 (2d Cir. 1991) 17

Landry v. Airline Pilots Assn. Intl., 901 F.2d 404 (5th Cir. 1991) 13

Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806 (1987) 18, 20

Russello v. United States, 464 U.S. 16 (1983) 22, 23

Sedima, S.P.R.L., v. Imrex Company, Inc., et al., 473 U.S. 479 (1985) 9, 11, 19, 20, 21, 22

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) . . . 9

Tafflin v. Levitt, 110 S.Ct. 792 (1990) 9

Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263 (3d Cir. 1987) 15

United States v. Indelicato, 865 F.2d 1370 (1989) 16

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991) 17, 18

United States v. Turkette, 452 U.S. 576 (1981) 21

Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132 (D.C. Cir. 1991) 13

FEDERAL STATUTES:

Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. s. 1961, et. seq. 3, 5, 6, 7, 8, 9, 10, 12, 13, 15, 17, 18, 20, 21, 22, 23, 24

84 Stat. 947 (1970) 5

LEGISLATIVE MATERIALS:

Federal Government's Use of RICO Statute And Other Efforts Against Organized Crime, S. Rep. No. 101-407, 101st Cong., 2d Sess. (1990) 9

MISCELLANEOUS:

Blakey and Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts---Criminal and Civil Remedies, 53 Temp. L.Q. 1009 (1981) 22

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio is unreported.

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 956 F.2d 560 (1991). It is reproduced in the Appendix.

The Court of Appeals for the Sixth Circuit denied a Petition for Rehearing.

JURISDICTION

The Court of Appeals for the Sixth Circuit denied rehearing on March 27, 1992. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. Section 1254(1) (certiorari) and Rule 10.1(b) (conflict) and (c) (important and unsettled questions) of this Court.

STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations Act (RICO), Title 18, United States Code, provides in part:

Section 1961. Definitions.

As used in this chapter --

(1) "racketeering activity" means any act or threat involving ... [State law extortion]; ... any act ... under ... Title 18 United States Code ... Section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud) ... Section 1951 (relating to ... extortion) ...;

(4) "enterprise" includes any ... legal entity, and any ... group of individuals associated in fact although not a legal entity ...;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity ... ;

Section 1962. Prohibited Activities.

(a) It shall be unlawful for any

person who has received any income derived ... from a pattern of racketeering activity ... to use or invest ... any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise ... ;

(c) It shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity ... ;

***

Section 1964. Civil Remedies.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains

and the cost of the suit, including a reasonable attorney's fee.

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84 Statutes at Large 947 (1970) provides:

Section 904 (a) The provisions of ... [RICO] shall be liberally construed to effectuate its remedial purposes.

STATEMENT OF THE CASE

On October 10, 1989, John Vild ("Vild") filed a complaint in the District Court for the Northern District of Ohio. The Complaint alleged that in June, 1989 Vild entered into a marketing agreement with C.W. Sattenfield ("Sattenfield"), a general partner in Longboat Ventures, Ltd., to market interests in a Florida time-share resort called the Longboat Bay Club in Ohio. Vild entered the agreement in reliance on Sattenfield's assurance that adequate start-up capital was available and would

be provided for the project.

Longboat Ventures, Ltd. failed to provide Vild with the promised capital. Sattenfield unilaterally altered the agreement to require a 50% kickback of all Vild's profits upon a general threat against his business and family, and compelled Vild to sign a note for $20,000 in order to open the Club. Meanwhile, the respondents began and have continued to solicit purchasers themselves through unlicensed salespeople and unregistered brokers using unlawful mailings.

Vild's complaint charged the respondents with a number of counts separately and in violation of subsections (a) and (c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. section 1961, et. seq. Vild alleged an association in fact enterprise composed of four named individuals, one corporation, and ten

unnamed individuals. In addition, he alleged a pattern of racketeering activity comprised of the acts of wire fraud committed against himself and the acts of wire and mail fraud committed against potential and ultimate purchasers of the interests.

The United States District Court for the Northern District of Ohio granted the respondents' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to establish a pattern of racketeering activity. The Court of Appeals for the Sixth Circuit affirmed the decision, dismissing Vild's RICO claim for his failure to allege injury by each of the alleged predicate acts.

REASONS FOR GRANTING THE WRIT

This Court Should Grant A Writ of Certiorari To Review The Court Of Appeals' Decision Since It Is In Direct

Conflict With Controlling Decisions Of Other Courts Of Appeal, And With The Teachings of This Court.

The application of RICO, an important federal statute, to ostensibly legitimate enterprises engaged in patterns of racketeering activity is in continuing conflict in light of the decision of the Court of Appeals for the Sixth Circuit in this case. The need for effective use of the civil RICO provisions requires that this conflict be settled.

RICO was enacted in 1970 as part of the Organized Crime Control Act. The statute is being used in the successful prosecution of numerous associations, fully illegitimate and ostensibly legitimate, which are engaging in

systemic criminal activity.[1] Although private parties did not begin to bring civil RICO suits until about 1975, today a considerable number of civil RICO claims are also filed each year.

This Court has rejected efforts to construe RICO narrowly in five civil actions. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987); Agency Holding Corp. v. Malley, Duff & Associates, 483 U.S. 143 (1989); H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989); Tafflin v. Levitt, 110 S. Ct. 792 (1990).[2] Here,

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[1] Federal Government's Use of RICO Statute and Other Efforts Against Organized Crime, S. Rep. No. 101-407, 101st Cong., 2nd Sess. 31-36 (1990).

[2] This Court's decision in Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311 (1992) is not to the contrary. There, this Court neither narrowed nor broadened RICO; it merely applied traditional proximate cause standards to the statute. See 112 S. Ct.

too, this court should reject unjustifiable efforts to narrow the statute.

This Court, moreover, specifically rejected a narrow construction of the requirement of a pattern of racketeering activity in H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989). Finding but a "broad outer limit" on the concept of a pattern, the Court declined to contrive a special or strict definition. "It is not the number of predicates, but the relationship that they bear to each other or to some external organizing principle that renders then 'ordered' or 'arranged.' "H.J. Inc., 492 U.S. at 238. The Court found that Congress intended a "flexible approach" to RICO and held that a pattern could be demonstrated by reference to "a

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at 1321 ("nothing illiberal in our construction").

range of different ordering principles between predicates" as long as the plaintiff shows that the acts "are related, and ... amount to or pose a threat of continued criminal activity." H.J. Inc., 492 U.S. at 238, 239. After alleging predicate acts of racketeering activity in connection with the enterprise, the plaintiff must negate the possibility that the acts are random or "sporadic". Beyond this, nothing more is required. Sedima, 473 U.S. at 497.

The Sixth Circuit here, however, held that Vild could not include in "his" pattern of predicate acts those directed not only at him, but also those directed at other entities doing business with the Club. Since Vild was not injured by the acts directed at the other persons or entities, he could not, moreover, use those acts to establish continuity. Accordingly, as for the scheme that did

injure him, six to seven months was too short a period to establish a closed period of repeated activity and as the predicate acts were neither inherently threatening nor a regular way of doing business, they did not establish a threat of continuity. As such, Vild had not alleged a pattern.

The Sixth Circuit attempted to justify its narrow position by drawing a distinction between civil and criminal RICO cases based on the difference between ostensibly legitimate and wholly criminal enterprises. In the context of a wholly criminal enterprise, said the Court, the predicate acts are necessarily interrelated as they involve the same purpose and relationship to the enterprise. Illegitimate acts committed by an otherwise legitimate enterprise are not so intrinsically related, and a plaintiff then faces a stricter standard

for establishing that the alleged predicate acts comprise a pattern of racketeering activity.

Similarly, the Fifth and District of Columbia Circuits have held that a civil RICO plaintiff may not allege predicate acts that are not directed at him as part of a pattern of racketeering activity. Landry v. Airline Pilots Assn., Intl., 901 F.2d 404, 426 (5th Cir. 1990); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 138 (D.C. Cir. 1991). Neither court, however, offered any substantive reason to justify its position.

In direct conflict with the Sixth, Fifth and District of Columbia Circuits, the Third Circuit in Banks v. Wolk, 918 F.2d 418 (3d Cir. 1990) upheld a claim under 18 U.S.C. 1962(c) based on one count of fraud against the plaintiff and six other incidents of fraud committed

against third parties. "The reference to 'similar victims' in H.J. Inc. cannot, "the Court held," be read to require that a plaintiff be injured by more than one predicate act." Banks, 918 F.2d at 423. The schemes viewed as a whole showed that the defendants were "at least partially in the business of defrauding those who dealt with [the enterprise]," and the alleged victims "were 'similar' in the sense that they all were engaged in business dealings with the [enterprise]." Banks, 918 F.2d at 423.

Similarly, the Eleventh Circuit in Durham v. Business Management Associates, 847 F.2d 1505, 1512 (11th Cir. 1988), a decision that involved two schemes to defraud different investors, held that "the acts...[in the two schemes were] sufficiently similar" to constitute part of a "pattern".

Under the Third Circuit's view, a

requirement of injury by all of the acts "conflate[s] ... two separate injuries: first, was there a pattern of racketeering activity violating RICO, and second, was the plaintiff injured by the RICO violation." Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1264 (3d Cir. 1987). A plaintiff need not, therefore, allege a pattern of injury to prove a pattern of racketeering activity, but need only show a series of offenses related to a common purpose of the enterprise. Otherwise separate and distinct acts of fraud which comprise "a related pattern of ... corruption for the benefit of the common participants" is sufficient. Town of Kearny, 829 F.2d at 1268.

The Third Circuit also correctly teaches that both prongs of the pattern test are to be broadly construed, particularly in the context of a

diversified criminal enterprise. "[In cases] which allege multiple fraudulent schemes conducted through an otherwise legitimate entity, the [pattern] requirement should not insulate defendants who merely vary the methods by which they defraud their victims." Banks, 918 F.2d at 425.

The Second Circuit, too, consistently gives the pattern requirement a "generous reading." United States v. Indelicato, 865 F.2d 1370, 1373 (1989). The standards for relatedness listed in H.J. Inc. are suggestions, and a pattern can be established even if none of these elements is present. Indelicato, 865 F.2d at 1382-3. If the plaintiff suffers injury by reason of the pattern, therefore, even though he is not injured by every predicate act under the teachings of Kerr-McGee Refining Corporation v. M/T Triumph, 924 F.2d 467,

469-70 (2nd Cir. 1991). A rule that the plaintiff cannot allege unrelated incidents as part of a pattern of racketeering activity would, the court held, have the anomalous effect of precluding civil RICO claims except in those "rare instances" in which a pattern of predicate acts are directed against the plaintiff. Kerr-McGee, 924 F.2d 467 at 470.

The Seventh Circuit in United States v. Masters, 924 F.2d 1362 (1991) also deemed the fact that the activities of an enterprise are diverse grounds for expanding, not narrowing the test for a pattern of racketeering activity. "Versatility, flexibility, and diversity are not inconsistent with pattern ... [On the contrary,] [a] criminal enterprise is more, not less dangerous if it is versatile, flexible, [and] diverse in its objectives and capabilities." Masters,

924 F.2d at 1367. Under the better view, therefore, it is immaterial whether the enterprise was designed or merely used for illegitimate purposes in order for those acts to be alleged as part of the pattern of racketeering activity. "The acts of a criminal enterprise within the scope of the enterprise's evolving objectives form pattern enough to satisfy the requirements of the RICO statute." Masters, 924 F.2d at 1367. Accordingly, separate acts of fraud can constitute a pattern and "each victim can sue the violator, adducing evidence of the offense against the other victims to meet the proof requirement [for] a pattern." Marshall & Ilsley, 819 F.2d 806, 810 (7th Cir. 1987).

This Court has stated that the injury that confers standing is injury flowing from the predicate acts, rather than from the pattern of such acts.

Sedima, 473 U.S. at 497. Once the plaintiff has shown injury by a predicate act, the court should look to the acts' relationship to the enterprise, not the plaintiff, in determining whether a pattern has been established. "[T]he essence of the violation is the commission of those acts in connection with the conduct of an enterprise." Sedima, 473 U.S. at 497.[3] A requirement of injury by every predicate act is, therefore, contrary to the specific standards set forth by this Court in H.J. Inc., under which a plaintiff may allege activities directed at a variety of victims in order to prove a pattern.

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[3] "If a plaintiff adequately proves a violation of s. 1962 by showing a pattern of racketeering activity in furtherance of the purposes of an enterprise, then the plaintiff should recover for whatever damages are directly caused by any part of the acts that added up to the pattern." Marshall & Ilsley, 819 F.2d 806 at 810.

Such a requirement is also illogical regarding RICO as a whole, which is directed against acts which are "distinct and separate in time." Marshall & Ilsley, 819 F.2d at 810.

This Court also squarely rejected an organized crime-type limitation on the civil provisions of RICO in Sedima. 473 U.S. at 497. In addition, the Court expressly denied separate treatment for "admittedly criminal" and "ostensibly legitimate" enterprises in H.J. Inc., rejecting a claim that, despite the "capacious language" it used, Congress designed the RICO pattern element with an "organized crime nexus" in mind. H.J. Inc., 492 U.S. at 236, 246. The Sixth Circuit's effort to reintroduce the distinction between illegitimate and legitimate organizations is, therefore, but another unjustified effort to limit RICO to organized crime type activity.

As such, it ought to be rejected.

The Sixth Circuit's decision here is also in direct conflict with the text of RICO. "The language of the statute [is] the most reliable evidence of [Congress'] intent," and RICO states on its face that it is to be "'liberally construed to effectuate its remedial purposes.'"[4] Turkette, 452 U.S. at 593; 84 Stat. 904 (1970). The breadth of the pattern requirement derives, therefore, from the statute's aim to encompass a wide range of criminal activities.

"'[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates

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[4] "In determining the scope of a statute we look first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." United States v. Turkette, 452 U.S. 576, 580 (1981).

breadth,'" and breadth is the distinctive characteristic of RICO, which is the only substantive provision of Title 18 containing a liberal construction directive. Sedima, 473 U.S. at 499; Russello, 464 U.S. at 27.[5]

Under the restrictive reading proposed by the Sixth Circuit, however, "'[w]hole areas of organized criminal activity... [might well] be placed beyond' the substantive reach of the enactment .... [including many of] the very crimes'" RICO was designed to eradicate. Russello, 464 U.S. at 27. To summarize, the Sixth Circuit's decision is based on a misconstruction of the standards set forth in H.J. Inc. and imposes an additional limitation on the RICO pattern concept that is in neither

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[5] "[I]f too close a relationship among multiple schemes is required, cases within RICO's intended ambit may be improperly dismissed." Banks, at 422.

the text nor legislative history of the statute. The Court's position is in direct conflict with the positions of the Second, Third, Seventh and Eleventh Circuit Courts of Appeal; it also expressly contradicts the liberal construction that Congress and this Court have mandated be given RICO.

This Court's approach to the exercise of its Certiorari jurisdiction is well-established. The resolution of conflicts "is one of the traditional function of this Court." Charles Dowd Bos. Co. v. Courtney, 368 U.S. 502, 514 (1962). See Moskal v. United States, 111 S. Ct. 461, 464 (1990) ("to resolve a divergence of opinion among the courts of appeals."). "[I]mportant and recurring" issues ought to be settled, Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232 (1959), which affect a "considerable number of suits,"

Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235, 237 (1964). Under these standards, this Petition is, therefore, eminently Certiorari-worthy.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Sixth Circuit.

Respectfully submitted,

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FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, certify that on this 11th day of June, 1992, I filed 40 copies of a Petition for a Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required three (3) copies to Mark I. Wachter and Paul I. Caimi of MAYS, KARBERG & WACHTER, Suite 250, Corporate Circle, 30100 Chagrin Boulevard, Cleveland, OH, 44124-5705.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

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John VILD, Plaintiff-Appellant,

Cross-Appellee,

v.

Dominic A. VISCONSI; Patricia Sattenfield; Sea/Mountain Resorts, Inc.; C. W. Sattenfield; Gerald Plonski; John Does; Defendants-Appellees, Cross-Appellants.

Nos. 90-4048, 90-4088

United States Court of Appeals, Sixth Circuit.

Affirmed in part and remanded in part.

Ralph B. Guy, Jr., J., filed a dissenting opinion and would grant rehearing.

Gregory T. Stralka (argued and briefed), Cleveland, Ohio, for John Vild.

Mark I. Wachter (argued and

briefed), Paul A. Caimi, Mays, Karberg & Wachter, Cleveland, Ohio, for Dominic A. Visconsi, Patricia Sattenfield, Sea/Mountain Resorts, Inc., C. W. Sattenfield, Gerald Plonski, John Does (Nos. 1-10).

Before GUY, Circuit Judge, WELLFORD, Senior Circuit Judge, and CHURCHILL*, Senior District Judge.

WELLFORD, Senior Circuit Judge.

John Vild, the plaintiff, appeals from the district court's denial of his Fed. R. Civ. P. 59(e) motion to alter or amend an earlier judgment dismissing his RICO[1] complaint and Fed. R. Civ. P. 15(a) motion to amend his RICO complaint. The defendants, various persons involved in a series of real estate enterprises, cross-appeal from the district court's denial

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et. seq.

of their Fed. R. Civ. P. 11 motion for sanctions against the plaintiff. Put simply, Vild tries to convince us that he has properly stated a RICO claim in his complaint or proposed amended complaint, while the defendants maintain that he failed to state a claim, and that his failure should bring about sanctions. We find that the district court did not err when it denied the plaintiff's motions under Rules 15(a) and 59(e), and therefore, we AFFIRM that portion of the decision. Although we do not rule on the merits of the sanctions issue, we find it appropriate to REMAND this issue for clarification as to the basis for the district court's denial of sanctions.

I. BACKGROUND

Plaintiff, an Ohio citizen, sued Dominic Visconsi of Ohio, C. W. and Patricia Sattenfield of Florida, Gerald Plonski of Ohio, and ten other unnamed

individuals and several business entities, for alleged violations of RICO, common law fraud, intentional interference with business relationships, conversion, negligence and breach of contract. Vild's allegations arose from a failed scheme in which he was to market interests in the Longboat Bay Club (Club), a real estate resort venture.

In addition to the original complaint, the plaintiff filed, or attempted to file, three amended complaints, the details of which are necessary for a complete understanding of the controversy before us. The plaintiff alleged throughout subject matter jurisdiction under RICO and under 28 U.S.C. § 1332 (diversity of citizenship).

The original complaint alleges that in late January, 1989, defendant C. W. Sattenfield, on behalf of the other named defendants, Dominic Visconsi, Patricia

Sattenfield, and Gerald Plonski, contacted the plaintiff by telephone to induce him to sign a marketing agreement to sell real estate interests in the Club. Vild contends that the defendants made material misrepresentations regarding the marketing agreement. He maintains in particular that the defendants represented that there was sufficient start-up capital to begin business operations. Allegedly due to these material misrepresentations, Vild complained that he entered into an exclusive marketing agreement and shortly thereafter signed a note for money advanced to him by defendants to initiate the venture. Vild asserts that the defendants encouraged him to establish the business so that they could later force him out and acquire the enterprise for themselves.

From the outset, the arrangement was

a failure. Once the plaintiff entered into the business relationship, C. W. Sattenfield telephoned him seeking to change the terms of the marketing agreement and proposing that the defendants receive "kickbacks" on any interests sold to the public. According to Vild, C. W. Sattenfield made threats to him, his family and to ruin his reputation. When Vild did not comply with the proposed changes, the defendants allegedly refused to provide additional inventory and start-up money.[2] The original complaint also alleges that the defendants refused to compensate Vild for sales made by him under the marketing agreement. Plaintiff maintains that these threats, phone calls, and material

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[2] Defendants provided $20,000 to the plaintiff, but they did not supply additional funds and inventory allegedly promised under an oral agreement. No reference was made to this in the written agreement.

misrepresentations all constitute predicate acts under RICO because they are violations of mail fraud, wire fraud and extortion statutes as well as the Hobbs Act.

The original complaint also alleges other predicate acts which are separate and distinct from the previously described scheme to defraud and extort the plaintiff. Vild contends that the defendants used, and continue to use, telephones and facsimile machines to solicit customers in Ohio to purchase interests in the Club. According to Vild, these solicitations constitute wire fraud because the defendants' salespersons are not licensed and registered to do business in Ohio. The plaintiff also alleges that the defendants engaged in, and continue to engage in, mail fraud because they used, and continue to use, letters which

technically violate several laws and regulations governing direct mail solicitation in Ohio. For instance, the letters do not maintain, as required by law, the odds of winning prizes. They also improperly use the word "sweepstake." Vild further complains that the defendants sent similar letters to potential consumers in Indiana in violation of that state's laws. Plaintiff maintains also that the defendants violated Florida law by fraudulently using real estate contracts which did not contain a mandatory ten-day cancellation provision.

Vild amended his original complaint by introducing several additional defendants, Gerald Plonski and ten unnamed individuals, who allegedly also violated the RICO statute. The plaintiff contends that Plonski, his sales agent, refused to pay him money earned from Club

sales because of "kickbacks" to the other defendants. The ten unnamed defendants were alleged officers, directors and shareholders of Sea/Mountain Resorts Inc. (Sea Mountain) established by defendants to market real estate interests in Ohio. These added individual defendants also allegedly engaged in the same type of racketeering, wire and mail fraud activities as the other defendants.

The plaintiff also attempted to file a second amended complaint, but the court denied his motion to amend. The second amended complaint alleges several new predicate acts and introduces a host of additional defendants. The new predicate acts center on the allegedly illegal status of another business entity controlled by the defendants. Vild maintains that Longboat Venture Ltd. (Longboat), the owner of the Club, was prohibited from doing business in Ohio

and Florida because its general partner, DVB, Inc. (DVB), failed to maintain its legal corporate status and also failed properly to register to do business. The plaintiff maintains that any solicitations by Longboat accordingly constitute wire and mail fraud.

The second amended complaint also alleges that several new RICO defendants were a part of the illegal enterprise. Vild contends that the defendants' law firm and three lawyers representing defendants fraudulently represented DVB's corporate status and its capacity to do business. One defendant lawyer allegedly sent a letter to the state of Ohio which indicated incorrectly that DVB had good standing in Ohio. Another defendant lawyer allegedly made a similar misrepresentation to the Court of Common Pleas of Cuyahoga County stating that Longboat was a valid limited partnership.

Plaintiff's contention is that Longboat was not a valid limited partnership because of DVB's status. These misrepresentations were allegedly intentionally made with knowledge that they were false.

Vild moved to file still another amended complaint, but this motion was denied. The third amended complaint adds very little to the earlier versions. Defendants further committed mail fraud by misrepresenting DVB's status to the State of Florida in order to validate its certificate to do business. The plaintiff also alleges that the defendants committed another RICO predicate act by misrepresenting DVB's status to the State of Ohio during the course of settlement negotiations.

II. DISTRICT COURT ACTIONS

After Vild filed his first amended

complaint, the defendants moved to dismiss the action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim and under Fed. R. Civ. P. 9(b) for failure to allege fraud with particularity. While these motions were pending, the plaintiff requested leave to file his second amended complaint which the court denied.

The next day, the district court granted defendants' motion to dismiss for failure to state a RICO claim because Vild did not allege "a pattern of racketeering activity," as defined by H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). The Supreme Court in H.J., Inc. held that a plaintiff must allege facts which prove that the predicate acts are related and pose a genuine threat of continuity. Id. 109 S. Ct. at 2900. Applying these requirements to Vild's case, the district court

concluded that "there exist[ed] no set of facts to show 'continuity.'" The district court stated, "[a]t best, the predicate acts alleged occurred over [sic] period of only a few months, and therefore, cannot be considered to have extended over a 'substantial' period of time." Continuity was also lacking because the plaintiff failed to show that the defendants "threat[ened]...long term racketeering activity" or that the predicate acts constituted a "regular way of doing business." In sum, the district court found that "the acts alleged amount[ed] at best to a breach of contract with a single customer."

Without a valid RICO claim, the district court concluded that there was no subject matter jurisdiction. The plaintiff could not invoke 28 U.S.C. § 1332 diversity jurisdiction because he did not show that "each defendant [was] a

citizen of a different State from each plaintiff."

Following the dismissal, Vild filed a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e) and also to amend the complaint once again under Fed.R.Civ.P. 15(a). By a marginal entry, the district judge denied the plaintiff's motion: "After careful consideration of the pleadings, the Court finds that the acts alleged amount to breach of contract. Accordingly, the Motion is denied." The plaintiff now appeals from the district court's action.

Prior to the district court's denial of the plaintiff's motion to alter or amend, the defendants filed a motion for Fed.R.Civ.P. 11 sanctions on the ground that the plaintiff's counsel failed to make an adequate prefiling inquiry into RICO requirements. By use of another marginal entry, the district court denied

the defendants' motion. The defendants accordingly cross-appeal.

III. STANDARD OF REVIEW

There appears to be some confusion regarding the proper standard of review of the district court's decision. Instead of appealing from the district court's original dismissal of the complaint under Fed.R.Civ.P. 12(b)(6), the plaintiff appeals from the later order which denied his motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e) and to amend the complaint for a third time under Fed.R.Civ.P. 15(a). Defendants maintain that a limited standard of review should apply, suggesting that the scope of our review is confined to whether the district court committed a "clear error of law." On the other hand, the plaintiff contends that we should apply

the more liberal "abuse of discretion" standard because he also appeals from the district court's denial of leave to amend the complaint. See Janikowski v. Bendix Corp., 823 F.2d 945, 951 (6th Cir. 1987).

[1] We typically review a district court's denial of a party's motion to amend under the abuse of discretion standard. See id. When, however, the district court has based its decision on "a legal conclusion that the amended pleading would not withstand a motion to dismiss," there is authority that we review such a decision de novo. Martin v. Associated Truck Lines, Inc., 801 F.2d 246, 248 (6th Cir. 1986); see also Dana Corp. v. Blue Cross & Blue Shield, 900 F.2d 882, 887 (6th Cir. 1990). In this case, following Martin's mandate, we will review the district court's RICO decision de novo to determine whether the district court abused its discretion because the

decision was based on the legal conclusion that the third amended complaint did not satisfy RICO's requirements.

[2] If the third amended complaint is not sufficient to establish a RICO claim and rectify what the district court deemed to be jurisdictional deficiencies, then there was no error in denying the motion to amend. See Martin, 801 F.2d at 248. If, on the other hand, the third amended complaint does sufficiently state a RICO claim, then we must examine with great care the denial of leave to amend. The essence of Vild's appeal is his assertion that the third amended complaint sufficiently stated a RICO claim.

IV. RICO'S PATTERN REQUIREMENTS

A. RELATED ACTIVITIES

The district court held that the plaintiff failed to satisfy RICO's "pattern of racketeering" requirement. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n.14, 87 L.Ed.2d 346 (1985). A "pattern of racketeering activity," requires that a plaintiff must prove "at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years...after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The Supreme Court has determined that there is more to the pattern requirement than this statutory definition. In addition to proving the prerequisite of two predicate acts, a plaintiff must show both a "relationship between the predicates" and the "threat of continuing activity." H.J. Inc., 109 S.Ct. at 2900. "It is this factor of

continuity plus relationship which combines to produce a pattern." Id. Continuity and relationship constitute two analytically distinct prongs of the pattern requirement. Id.

The district court determined that the plaintiff failed to satisfy the continuity prong of the pattern requirement. Although we are prone to agree with the district court that the plaintiff has not alleged a RICO pattern, we reach this conclusion by using a slightly different analysis. The district court did not determine whether the plaintiff fulfilled the relationship prong of the test. We find it necessary to examine the relatedness issue first before arriving at the continuity prong.

The plaintiff may satisfy the relationship requirement if the predicate acts alleged "have the same or similar purposes, results, participants, victims,

or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id. at 2901. This "test is not a cumbersome one for a RICO plaintiff," but it sets forth a requirement for a RICO cause of action nevertheless. Feinstein v. Resolution Trust Corp., 942 F.2d 34 (1st Cir. 1991).

[3] Here, Vild alleges two types of predicate acts to satisfy RICO's pattern requirement. The first type of conduct involves acts directed at the plaintiff by the defendants. Vild is the alleged victim of fraudulent and unlawful acts which include allegations of mail and wire fraud designed to induce him to enter into the marketing agreement plus allegations of extortion, threats and fraud in the administration of the marketing agreement. These events occurred over the course of a few months.

The second type of conduct alleged in the proposed amended complaint involves improprieties by defendants directed at others including ultimate purchasers of real estate interests, the states of Florida, Ohio and Indiana, and an Ohio court. These allegations focus on wire and mail fraud resulting from technical violations of laws regulating direct mail solicitation and marketing, misrepresentations about the status of one of the defendant business entities, and the use of illegal real est ate contracts in Florida. The plaintiff maintains that all of these activities, whether directly involving him or others, are related for the purpose of the pattern requirement. We do not agree. Even if the predicates within each of the two types of conduct may be somehow interrelated, the two types of alleged conduct are not related within the

meaning of RICO.

Applying the H.J., Inc. relationship test, we find that the two types of conduct have distinct and dissimilar "purposes, results, participants, victims, or methods of commission." H.J., Inc., 109 S.Ct. at 2901. According to the plaintiff's third amended complaint, the defendants' conduct directed toward him had two purposes--to induce him to sign the marketing agreement and then to force him out of business. The other alleged conduct was directed at ultimate purchasers of the real estate interests. This conduct, violations of laws governing direct mail solicitation and the use of certain illegal contracts in Florida, has, in our view, separate and unrelated purposes. In the case of the direct mail solicitations, the defendants' purpose was to sell real estate interests to

purchasers without the use of middlemen such as the plaintiff and to gain a marketing advantage with persons and entities beside plaintiff. None of this conduct had a similar or related purpose of inducing the plaintiff to make a contract with defendants or forcing the plaintiff out of business.

The two types of conduct also had disparate results. The first line of activities resulted in the plaintiff's association with the defendants in a marketing agreement and the eventual demise of the business venture. The second line of conduct was directed toward ultimate purchasers and resulted in unspecified individuals attending sales meetings and perhaps acquiring real estate interests in the Club, Longboat, or some other venture of defendants.

That the two types of conduct were directed at different victims indicates

another critical distinction which suggests to us that the alleged illegal acts were unrelated and dissimilar. The plaintiff was the only victim of the threats, extortion and fraud perpetrated with regard to the failed marketing agreement. He alleges no activity directed against anyone in his position. In contrast, ultimate purchasers and the states of Ohio, Florida and Indiana were the alleged victims of the illegal direct mail solicitations and the invalid real estate contracts. The plaintiff was never an ultimate purchaser of real estate interests, and never sought to be a customer or owner of the Club or Longboat. Plaintiff does not come to the court as an innocent purchaser of Florida swampland who was hoodwinked by the fast-talking defendants. He cannot complain about harm to these other persons or any

state agency.[3] The plaintiff alleges that the defendants denied him the benefits of a marketing agreement which would, in actuality, have put the plaintiff in the same position as the defendants, vis-a-vis third party purchasers, if the agreement had not been breached. Vild would have been an agent of defendant sellers. The plaintiff sues the defendants because he could not sell real estate interests, as he planned and contracted to do, to ultimate purchasers, the alleged victims of the conduct which the plaintiff now cites as related predicate acts under RICO. We do not hold that a civil RICO plaintiff must necessarily be directly harmed by all the alleged predicate acts, because harm from one enumerated violation may, in certain

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[3] The plaintiff's contentions present something akin to a standing problem, though we decline to use that analysis in this case.

situations, be sufficiently connected. Our conclusion merely reflects that this plaintiff, under the circumstances of this case, may not use unrelated predicate acts that allegedly may have harmed ultimate purchasers or other third parties not similarly situated to the plaintiff. When Vild complains that he was not allowed to reap the benefits of the injury-causing enterprise, of which he would have been a part, he has failed the relationship test.

[4, 5] Plaintiff's third amended complaint and its predecessors also fail to plead fraud with sufficient particularity under Fed.R.Civ.P. 9(b). To satisfy the requirements of this rule, the plaintiff must allege specifically times, places, contents and victims of the underlying fraud. See New England Data Servs., Inc. v. Becher, 829 F.2d 286, 292 (1st Cir. 1987). Though he has

satisfied the pleading requirements with regard to the conduct directed at him, plaintiff has not sufficiently pled other fraudulent conduct (improper direct mailings and illegal land contracts). He has not, for example, pled that defendants had no intention of carrying out sales of land interests to other persons.

[6] Our conclusion that the two lines of conduct were unrelated is also bolstered by the different "methods of commission" used by the defendants. The allegations regarding the marketing scheme with Vild involved extortion, threats, wire and mail fraud. The other alleged conduct included only alleged mail and wire fraud in the form of illegal telephone, fax and mail communications under consumer protection laws and misrepresentations concerning DVB's corporate status. The claimed

violations are technical in nature and would not necessarily preclude purchasers from enforcing contract rights. A mere allegation that the defendants used wire and mail fraud in two otherwise dissimilar schemes does not, under the circumstances, satisfy the relationship prong of the pattern test. We agree that multiple wire and mail fraud allegations "are perhaps unique among the various sorts of 'pattern of racketeering activity.'" U.S. Textiles, Inc. v. Anheuser-Busch Co., 911 F.2d 1261, 1268 (7th Cir. 1990) (citation omitted). The "number of [mail and wire fraud] offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance" in some instances. Ashland Oil Inc. v. Arnett, 875 F.2d 1271, 1278 (7th Cir. 1989) (discussing wire and mail fraud in connection to the continuity prong of the pattern requirement). We

believe this description of "tangentially related" offenses applies in this case. Though the direct mail solicitations may have been part of a concerted plan, we find that the wire and mail fraud offenses perpetrated against the plaintiff during the negotiation and administration of the marketing agreement were, at best, "happenstance," and therefore, unrelated to the other alleged conduct committed against ultimate consumers.

That some of the same participants engaged in both lines of conduct does not alter our conclusion that the predicate acts in the two schemes were unrelated. See Feinstein, 942 F.2d at 45.

We draw support for our analysis from cases in which other courts have put teeth into the relationship prong of RICO's pattern requirement. See Feinstein, 942 F.2d at 44-45; Hartz v.

Friedman, 919 F.2d 469, 474 (7th Cir. 1990) (concluding that the plaintiff did not satisfy the relationship prong of the pattern requirement even though the same victims were involved in both alleged schemes). In Feinstein, the plaintiff alleged that the defendants engaged in two separate real estate schemes, one in New York in 1986 and another in Texas in 1988. As predicate acts, the plaintiff alleged that the defendants perpetrated a series of wire fraud offenses. Of the various defendants, only two, Gleason and Foster, were involved in both schemes. The court found:

> We recognize that, as pleaded, the 1986 and 1988 episodes each featured serial transactions that had some common reference points, most notably the victim's identities

and the Gleason/Foster axis.[4] Moreover, the purpose of the underlying transactions were at least similar. But notwithstanding these facts, plaintiffs' RICO claim founders on the bald assertion that these two episodes, nearly two years apart in time, hundreds of miles apart in space and involving two largely distinct groups of participants, were somehow pieces of a unitary scheme. We fully agree with the court below that the facts as alleged...did not implicate any of the other defendants in the same way.

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[4] It should be noted that the court indicated that the allegations against Gleason and Foster were only arguably sufficient to meet the relationship portion of the test, Feinstein, 942 F.2d at 45. The court did not have to address this issue because Gleason and Foster did not move to dismiss the complaint.

Id. at 44-45. As in Feinstein, plaintiff has failed to allege facts sufficient to draw the necessary nexus between the two types of conduct perpetrated by the defendants, and Vild constructs a weaker nexus than the plaintiff in Feinstein.

We are aware that some cases hold that the relationship test is satisfied by conduct which seems to us to be disconnected or dissimilar. See e.g., Banks v. Wolk, 918 F.2d 428 (3rd Cir. 1990). In Banks, applying a very liberal version of this test, the court determined that the seven episodes were sufficiently related because, among other things, several of the allegations involved breaches of fiduciary duty and attempts to drive down the price of real estate. Id. at 425. We construe the relationship prong more narrowly than the Third Circuit did in Banks.

[7] Three other cases do not

conflict with our decision, in our view: United States v. Busacca, 936 F.2d 232 (6th Cir.), cert. denied, --U.S.--, 112 S.Ct .595 (1991); United States v. Eufrasio, 935 F.2d 553 (3rd Cir.), cert. denied, --U.S.--, 112 S.Ct. 340, 116 L.Ed.2d 280 (1991); United States v. Kaplan, 886 F.2d 536 (2d Cir. 1989), cert. denied, 493 U.S. 1076, 110 S.Ct. 1127, 107 L.Ed.2d 1033 (1990). In Eufrasio, a criminal proceeding, the court held "that separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise." Eufrasio, 935 F.2d at 566. Eufrasio dealt with an organized crime enterprise whose sole reason for existence was to make money by committing

illicit predicate acts sometimes involving violence. In a criminal prosecution context, predicate acts committed by organized crime families are necessarily related because they have the same purpose and relationship to the enterprise. Id. at 565. The same does not hold true in civil cases in which businesses may have multiple legitimate purposes and the predicate acts are not related to the enterprise in the same way. Kaplan and Busacca which are involved violent acts, did not alter our analysis because they merely allowed the United States to satisfy the continuity requirement by referencing arguably related external facts beyond the predicate offenses charged in the context of criminal proceedings.

B. CONTINUITY

We do not end our inquiry with the

conclusion that the two lines of alleged conduct in this case are not related to one another for civil RICO purposes. We proceed to the second prong of RICO's pattern requirement to determine whether the plaintiff has alleged facts which demonstrate a "threat of continuing activity." H.J. Inc., 109 S.Ct. at 2900. Since the two types of conduct we have described are not related, the plaintiff must prove that either or both of the schemes satisfies the continuity prong on its own, without reference to predicates in the other scheme.

[8] Continuity "is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 2902. The plaintiff may prove continuity by showing a series of past related predicates occurring over

an extended period of time. A few months period usually is not sufficient. A second means of establishing continuity is to show that the predicates, by their nature, "involve a distinct threat of long-term racketeering activity." Id. Though the Court was not able to craft a bright-line test to define further this type of continuity, it provided the often-quoted example of a hoodlum who extorts money from a number of shop owners and threatens to return each month to collect protection money. Id. A third way to prove continuity in this case is to allege "predicates [that] are a regular way of conducting defendant's ongoing legitimate business...or of conducting or participating in an ongoing and legitimate 'RICO enterprise.'" Id.

[9] As to defendants' conduct directed toward the plaintiff himself, we find no error in the district court's

decision holding that the plaintiff did not prove continuity because the improper activities lasted only a short time. The third amended complaint alleges that the first fraudulent conduct in the marketing agreement scheme occurred in January, 1989, and the last acts took place in the summer of the same year. If the allegations are to be taken as true, at most, the defendants threatened and defrauded the plaintiff over the course of about six or seven months. This limited period of time is not adequate to satisfy the closed-ended formulation of continuity. Cf. Dana Corp., 900 F.2d at 887 (continuity requirement satisfied when fraud occurred over the course of seventeen years). Similarly, the plaintiff cannot fulfill the open-ended formulations of the continuity test because he has not alleged facts which, by their nature, demonstrate only a

threat of indefinite improper activity, nor has he alleged facts which show that the conduct directed toward him is a normal way of doing business for the defendants. There is no allegation that defendants continued to threaten and defraud him or threatened and defrauded others in similar marketing agreements. As the district court concluded, "the acts alleged amount at best to a breach of contract with a single customer."

[10] The plaintiff's allegations regarding the second type of conduct--acts directed toward others including ultimate purchasers and the states of Florida, Ohio and Indiana--also fail to satisfy the continuity prong of the pattern test. These activities simply did not harm, nor threaten to harm, the plaintiff. We conclude that even if these activities by themselves were deemed to satisfy the continuity prong,

the plaintiff would still fail to state a RICO pattern. Plaintiff may not complain about conduct which did not harm him under the guise of RICO continuity, unless those improper acts directed toward others are functionally related to the acts which harmed the plaintiff. A pattern of racketeering activity accordingly is not present in this case.[5]

[11] We are persuaded that only conduct which is essentially related may be used to establish continuity. See, H.J. Inc., 109 S.Ct. at 2902. A civil plaintiff may not use one type of conduct (acts directed at him) to satisfy the relationship test, and then invoke a

---

[5] We do not believe that bolstering our analysis of the relationship test by citation to the continuity test violates the Supreme Court's admonition that "[f]or analytic purposes these two constituents of RICO's pattern requirement [relationship and continuity] must be stated separately." H.J., Inc., 109 S.Ct. at 2900.

second type of conduct (unrelated acts directed at others) to fulfill the continuity test absent similar types of conduct and victims who are essentially in the same position. Only predicate acts that are related to each other may be used to satisfy both tests where plaintiff complains essentially that defendants' conduct deprived him of a position as agent for defendants.

A pattern of conduct is an "arrangement or order of things or activity." Id. at 2900 (citation omitted). To form a pattern, all predicate actions must have a relationship to one another. The conduct cited by the plaintiff does not form a "pattern" under the general description of H.J. because the two types of activities--the fraudulent acts committed against the plaintiff in the context of forming and operating the marketing

agreement, and the alleged unrelated fraudulent acts perpetrated against others--do not have an internal connection or arrangement; there is no real nexus between them.

We conclude that the plaintiff has failed to allege facts in his third amended complaint which would remedy the problems in the previous complaints. We conclude, for the reasons stated, that the third amended complaint fails to present facts which would satisfy the relationship and continuity prongs of RICO's pattern of racketeering test.

V. DIVERSITY JURISDICTION

[12, 13] Plaintiff also maintains that subject matter jurisdiction is proper under 28 U.S.C. § 1332. We find no error in the decision that complete diversity as required by Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365,

373, 98 S.Ct. 2396, 2402, 57 L.Ed.2d 274 (1978), does not exist because the plaintiff and at least two of the defendants are citizens of Ohio. To counter this fact, the plaintiff cites Schuckman v. Rubenstein, 333 U.S. 875, 68 S. Ct. 905, 92 L.Ed. 1151 (1948), for the proposition that the non-diverse parties, not the complaint, should have been dismissed. We will not entertain this argument because the plaintiff admitted at oral argument that he did not request in the district court that the non-diverse parties be dismissed. We will not consider such arguments when they are not raised below. See Maczko v. Joyce, 814 F.2d 308, 310 (6th Cir.), cert denied, 484 U.S. 828, 108 S. Ct. 98, 98 L.Ed.2d 58 (1987).We find no merit to the plaintiff's additional claim that subject matter jurisdiction is proper under United Mine Workers v. Gibbs, 383 U.S.

715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Pendent jurisdiction does not exist in this case because, as previously discussed, the federal RICO claim has been properly dismissed under Fed.R.Civ.P. 12(b)(6). See Aschinger v. Columbus Showcase Co., 934 F.2d 1402, 1412-13 (6th Cir. 1991); Gaff v. FDIC, 814 F.2d 311, 319 (6th Cir. 1987). The new supplemental jurisdiction statute, 28 U.S.C. § 1367(a), which was intended to codify pendent and ancillary jurisdiction, does not apply to this case because Vild filed his complaint prior to December 10, 1990, the effective date of the statute. See Miller v. Glanz, 948 F.2d 1562 (10th Cir. 1991).

VI. RULE 11 SANCTIONS

[14] The standard of review for all aspects of a district court's Rule 11 determination is "abuse of discretion."

Cooter & Gell v. Hartmarx.Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). The defendants argue that Rule 11 sanctions are mandatory when a breach of the duty to make a proper prefiling investigation has occurred. See Albright v. Upjohn Co.,788 F.2d 1217, 1222 (6th Cir. 1986). They reason that the plaintiff's four amended complaints, none of which successfully stated a cause of action under RICO or established subject matter jurisdiction, constituted a violation of the duty to know the applicable law. See Fleischhauer v. Feltner, 879 F.2d 1290 (6th Cir. 1989), cert. denied, 493 U.S. 1074, 110 S.Ct. 1122, 107 L.Ed.2d 1029 (1990). To support their position, the defendants cite Smith Lumber Co. v. Edidin, 845 F.2d 750 (7th cir. 1988), A case in which the court of appeals imposed sanctions when the plaintiff failed to allege facts to

establish a RICO pattern. In the alternative, the defendants argue that if we will not impose sanctions, then we should remand this issue to the district court so that it can clarify the basis for its decision to deny the defendants' motions.

We do not express any opinion on the merits of the district court's decision to deny the defendants' motions because we believe that a remand is appropriate in this case so that the district judge can specify the rationale for his holding. See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987), cert. dismissed, 485 U.S. 901, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988) (holding that a reviewing court cannot tell whether the district court abused its discretion absent articulated reasons); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 158 (3d Cir. 1986) (holding

that remand is appropriate when a district court has failed to specify its reasons for denying a Rule 11 motion).

The district court has not provided a rationale to allow us to review whether it has abused its discretion by denying the defendants' motions. In this case, the defendants filed two separate motions for sanctions--one which was attached to their brief in opposition to the plaintiff's Rule 59(e) motion and a second which was filed one and one-half months later as an independent motion. In a marginal entry, the district court denied the defendants' motion because "[defendants'] [a]ttorney has cited All Hawaii Tours v. Polynesian Cultural Center, 116 F.R.D. 645 (D. Hawaii 1987) in his Brief in Opposition to Plaintiff's Motion to Alter or Amend Judgment. However, see 855 F.2d 860 (9th Cir. 11988): that decision was reversed on

8/16/88." This annotation appears on the second motion for sanctions, but that motion does not rely on the All Hawaii Tours decision. We cannot tell whether the district court examined the motions independently and/or whether there were adequate grounds for awarding sanctions based on the second motion apart from the overruled case.

VII. CONCLUSION

The district court did not abuse its discretion by denying the plaintiff leave to amend once again. The district court was not in error in concluding that none of the complaints established a RICO claim, and it did not err when it denied the plaintiff's motion under Fed. R. Civ. P. 59(e) to alter or amend its earlier 12(b)(6) judgment. We AFFIRM the district court's decision on the RICO and jurisdictional issues. With regard to

the Rule 11 question, we REMAND the decision to the district court so that it can clarify the basis for its decision.

RALPH B. GUY, Jr., Circuit Judge, dissenting.

The court concludes that the continuity requirement is not met because the defendants' allegedly fraudulent marketing practices are not related to the conduct involving Vild. Since I believe the two types of alleged conduct are sufficiently related to constitute a pattern of racketeering activity, I respectfully dissent.

The Supreme Court has held that predicate acts are related if they have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J., Inc. v.

Northwestern Bell Tel. Co., 492 U.S. 229, 240, 109 S.Ct. 2893, 2901, 106 L.Ed.2d 195 (1989) (emphasis added). The use of the disjunctive indicates that the relatedness requirement is met if the predicate acts are the same or similar in any of the enumerated ways.

The two types of predicate acts alleged in Vild's complaint meet this broad test of relatedness because the two schemes have the same participants. This fact distinguishes this case from Feinstein v. Resolution Trust Corp., 942 F.2d 34 (1st Cir. 1991). In Feinstein, the court held that the two predicate schemes were unrelated as to most of the defendants because only two of the defendants participated in both schemes. Id. at 45. However, the court stated that the two schemes were "arguably sufficient to show relatedness with regard to the actions of common

participants...." Id.

Since both sets of Vild's allegations involve the same participants, I would find that his complaint meets the relatedness requirement. Since Vild alleges that the defendants' have fraudulently marketed the condominiums to investors for several years, I would also find that the continuity requirement is met. I would therefore reverse the district court's dismissal of Vild's RICO count.

91-2084

No. (2)

Supreme Court, U.S.
FILED
JUL 13 1992
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN VILD,

Petitioner,

v.

DOMINIC A. VISCONSI et al.,

Respondent.

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

	Page
TRIAL COURT OPINION	52
DENIAL OF REHEARING (6th Cir)	72
DATE OF DECISION IN 6th Cir	74

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN VILD,	)	Case No. 89-1934
	)	
Plaintiff,	)	
	)	
- v -	)	ORDER
	)	
DOMINIC A. VISCONSI, et al,	)	
	)	
	)	
Defendants.	)	

Battisti, J.,

Before the court is Defendants' Motion to Dismiss Plaintiff's First Amended Complaint ("Complaint"). Plaintiff John Vild claims violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1961, et seq., and seeks injunction and damages. Plaintiff also seeks damages for alleged common law fraud, intentional interference with business relationship, conversion,

negligence, and breach of contract. Defendants Dominic A. Visconsi, C.W. Sattenfield, Patricia Sattenfield, and Gerald Plonski seek dismissal of Plaintiff's First Amended Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), arguing that Plaintiff fails to state a claim upon which relief can be granted with respect to the alleged RICO claims and fails to allege fraud with particularity. Defendants also argue that if the RICO actions are dismissed this Court is without subject matter jurisdiction as there is no diversity of citizenship under 28 U.S.C. Section 1332(a).

FACTS

Plaintiff, who "can be found," at a Valley View, Ohio address, conducts business under the name of Mariner

Company. (Complaint at Para. 4). Defendants consist of four individuals, an entity, and ten unnamed Defendants. Defendant Visconsi, who "can be found," at a Chagrin Falls, Ohio address, and Defendants C.W. and Patricia Sattenfield, who "can be found," at a Florida address, (Complaint at Paras. 5-7), principally own, operate, and/or control entities known as Longboat Ventures Ltd., Longboat Bay Club, Sea/Mountain Resorts, Inc., Sea and Ski, DVB Inc., and Resort Properties of America. (Complaint at Para. 8). Sea/Mountain Resorts, Inc., a named Defendant, is an Ohio Corporation, having its principal place of business in Seven Hills, Ohio. (Complaint at Para. 10). The ten unnamed Defendants, represent officers, directors, and shareholders of Defendant Sea/Mountain Resorts, Inc. (Complaint at Para. 11). A final

Defendant, Gerald Plonski, "can be found" at a Garfield Heights, Ohio address. (Complaint at Para. 9).

In substance, Plaintiff alleges that he entered a marketing agreement with Longboat Ventures Ltd. to market, in Ohio, the Longboat Bay Club and that due to misrepresentations regarding the terms and conditions of the agreement, Plaintiff has been damaged through loss of profits and loss of advantageous business relationships. Plaintiff claims that the Defendants, who are allegedly associated in fact though not in law, committed: (1) acts of wire fraud, in violations of 18 U.S.C. Section 1343; (2) mail fraud, in violation of 18 U.S.C. section 1341; (3) violations of the Hobbs Act, 18 U.S.C. Section 1951; and (4) extortion, in violation of Ohio Rev. Code Ann. Section 2905.11.

Specifically, beginning on or about late January, 1989, (Complaint at Para. 14), Plaintiff alleges that Defendant contacted Plaintiff by telephone, "to induce Plaintiff to market Longboat Bay Club in the State of Ohio." (Complaint at Para. 15). Defendants allegedly misrepresented "material facts regarding said business venture, including but not limited to the fact that sufficient start-up capital was presently available and in the possession and control of the RICO Defendants, and such capital was intended to be given to Plaintiff for his use in marketing Longboat Bay Club," (Complaint at Para. 17), and "materially misrepresent[ed] to Plaintiff certain terms and conditions under which Longboat Bay Club would be marketed," (Complaint at Para. 21). Further, Defendants allegedly solicited potential customers

of Longboat Bay Club to purchase interest in Longboat Bay Club and that the customers relied on "unlicensed salespersons and an illegally registered broker to 'sell' them their interests," (Complaint at Paras, 22-23).

Plaintiff alleges that Defendants sent letters to potential customers to attend a sales program to sell Longboat Bay Club interests and that the letters "did not properly, under state law, quote the odds of winning various prizes, failed to properly state that customers had to attend a sales presentation, and improperly used the word "sweepstakes." (Complaint at Paras. 28-29).

Plaintiff claims that Defendants failed to register Longboat Bay Club to conducts sales in Ohio, delaying the opening date, and causing Plaintiff "to advance start-up capital for Longboat Bay

Club when such capital was to be supplied by the RICO Defendant." (Complaint at Paras. 36-37).

Plaintiff further alleges that Defendant Sattenfield attempted to change certain terms of the Marketing Agreement, threatening to "damage Plaintiff's business repute: and telling "Plaintiff that when making his decision regarding the 'new' terms of the Marketing Agreement, Plaintiff should 'think about [his] family,'" (Complaint at Paras. 38-39). Due to Plaintiff's refusal to comply with a certain term, Defendants "refused to provide any additional start-up capital and essential inventory of Longboat Bay Club interests to Plaintiff in order to market Longboat Bay Club," (Complaint at Para. 44), and amounts to which Plaintiff was entitled. (Complaint at Para. 45). Finally,

Defendants allegedly "attempted to takeover the Plaintiff's office by making phone calls to Plaintiff's landlord in an effort to assume Plaintiff's business location to market longboat Bay Club," (Complaint at Para. 46).

A "Marketing Agreement" dated June 15, 1988 and entered into by the Mariner Company and Longboat Ventures Ltd. is attached to the Complaint. (Complaint, Exhibit B). Also attached to the complaint is an agreement allegedly making Defendant Plonski dealer in charge of sales of interests in Longboat Bay Club on behalf of Plaintiff. (see Complaint at Para. 9 and Exhibit A).

DISCUSSION

Plaintiff alleges that jurisdiction "arises under RICO, 18 U.S.C. Section 1964 (a) and (c), and because the amount

in controversy exceeds fifty thousand dollars ($50,000) and diversity of citizenship exists between the parties, 28 U.S.C. Section 1332 . . .."

(Complaint at Para. 2).

Plaintiff alleges violations of subsections (a) through (d) of 18 U.S.C. Section 1962 of RICO:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any

> enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt....
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. Section 1962

Defendants argue that the court does not have diversity jurisdiction under 28 U.S.C. Section 1332. Defendants further argue that, pursuant to Federal rules of Civil Procedure 12 (b)(6) and 9(b), Plaintiff's RICO claims are deficient in that Plaintiff fails to allege certain necessary elements of the a civil RICO

cause of action: namely, "enterprise"; "predict acts"; and, a "pattern of racketeering activity." Defendants also argue that Plaintiff has failed to allege certain particular elements of subsections (a) through (d).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the court "must accept all of the plaintiff's allegations as true and resolve every doubt in his favor." Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485, 489 (6th Cir. 1990)(citing Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229. 2232, 81 L.Ed.2d 59 (1984)). "[A] complaint should not be dismissed for failure to stat a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct.99, 102, 2 L.Ed.2d 80 (1957).

1. Diversity

Since Plaintiff has not alleged facts showing that "each defendant is a citizen of a different State from each plaintiff, Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978), 28 U.S.C. Section 1332 does not confer subject matter jurisdiction on the court.

2. Failure to State a RICO Claim

To properly allege a violation of Section 1962, Plaintiff must allege conduct of an enterprise through a pattern of racketeering activity. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

An "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and

any union or group of individuals associated in fact although not a legal entity ...." 18 U.S.C. Section 1961(4). An enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United State v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). "The 'enterprise' is not the 'pattern of racketeering activity'; it is "an entity separate and apart from the pattern of activity [a series of criminal acts] in which it engages." Id.

Pleading RICO predicate acts involving fraud must conform with the requirement of Federal Rule of Civil Procedure 9(b) requiring that "[i]n all averments of fraud, the circumstances constituting fraud shall be stated with

particularity." See, e.g., Michaels Building Co. v. Ameritrust Co., 848 F.2d 674 (6th Cir. 1988). For example, "[f]raud alleged in a RICO civil complaint for mail fraud must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact." Blount Financial Services, Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987). However, "Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8 [codifying policy of simplicity in pleadings]; rather the two rules must be read in harmony." Michaels, 848 F.2d at 679.

A "'pattern of racketeering activity' requires at least two acts of racketeering... the last of which

occurred within ten years...after the commission of a prior act of racketeering activity." 18 U.S.C. Section 1961(5). While a "pattern" requires proof of more than simple two predicates, "it might encompass multiple predicates within a single scheme." H.J. Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 2899 (1989). A "pattern" requires that "the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J., 109 S.Ct. at 2900.

The element of relatedness exists if the predicates "'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" H.J., 109 S.Ct. at 2901

(quoting 18 U.S.C. Section 3575(e)).

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects in to the future with a threat of repetition." H.J., 109 S.Ct. at 2902. Plaintiff can show "continuity over a closed period by probing a series of related predicates extending over a substantial period of time." H.J., 109 S.Ct. at 2902. A "pattern" also can exist "if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." Id.

In the instant case, there exists no set of facts to show "continuity." At best, the predicate acts alleged occurred over period of only a few months, and therefore, cannot be considered to have

extended over a "substantial" period of time. See H.J. Inc., 109 S.Ct. 2902 ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity requirement]."). This case differs significantly from one in which the alleged conduct occurs over some years. See, e.g., Dana Corp. v. Blue Cross & Blue Shield, 900 F.2d 882 887 (6th Cir. 1990)("allegations of fraud occurring for a period of seventeen years, along with the specific mailings evidencing the scheme, are sufficient to state a claim of a pattern of racketeering activity.").

Furthermore, Plaintiff has demonstrated no "threat of long-term racketeering activity," H.J. Inc., 109 S.Ct. 2902. Unlike the example provided in H.J. of the"hoodlum...sell[ing]

'insurance' to neighborhood storekeepers to cover them against breakages of their windows, telling his victims he would be reappearing each month to collect the 'premium' that would continue their 'coverage,'" Plaintiff's alleged related predicates do not include a specific threat of repetition extending indefinitely into the future." H.J., 2893 S.Ct. at 2902. At best, the acts alleged amount to a breach of contract but threaten no continued activity. Although the threat of continued activity may also be established "by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business," id, at 2902, Plaintiff has made no such showing. Again, the acts alleged amount at best to a breach of contract with a single customer.

Because Plaintiff has not properly

pleading the requisite "pattern of racketeering activity," Plaintiff's RICO claims must be dismissed, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The court need not determine, therefore, whether Plaintiff properly pleaded the elements of "enterprise" and "predicate acts" or the particular elements of subsections (as) through (d) of Section 1962.

3. Conclusion

Accordingly, Plaintiff's claims must be dismissed for lack of subject matter jurisdiction based on diversity of citizenship and failure to state a claim upon which relief can be granted with respect to the alleged RICO causes of action.

IT IS SO ORDERED

[signature]

Frank J. Battisti
United States
District Judge

[Order filed June 26, 1990]

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Case Nos. 90-4048/4088

JOHN VILD,	)	
	)	
Plaintiff,	)	
	)	
- v -	)	ORDER
	)	
DOMINIC A. VISCONSI, et al,	)	
	)	
Defendants.	)	

BEFORE: GUY, Circuit Judge; WELLFORD, Senior Circuit Judge; and CHURCHILL,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been

referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Guy would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

[signature]

Leonard Green, Clerk

*Hon. James P. Churchill sitting by designation for Eastern District of Michigan.

[Order filed March 27, 1992]

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-4048/4088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN VILD,
Plaintiff-Appellant, Cross-Appellee,

v.

DOMINIC A. VISCONSI; PATRICIA SATTENFIELD; SEA/MOUNTAIN RESORTS, INC.; C. W. SATTENFIELD; GERALD PLONSKI; JOHN DOES;
Defendants-Appellees, Cross-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed February 10, 1992

Before: GUY, Circuit Judge; WELLFORD, Senior Circuit Judge; and CHURCHILL*, Senior District Judge.

WELLFORD, Senior Circuit Judge, delivered the opinion of the court, in which CHURCHILL, Senior

*The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, certify that on this 9th day of July, 1992, I filed 40 copies of a Supplemental Appendix with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required three (3) copies to Mark I. Wachter and Paul I. Caimi of MAYS, KARBERG & WACHTER, Suite 250, Corporate Circle, 30100 Chagrin Boulevard, Cleveland, OH 44124-5705. The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

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(3)

Supreme Court, U.S.
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No. 91-2084

IN THE

Supreme Court of the United States

October Term, 1991

JOHN VILD,
Petitioner,

vs.

DOMINIC A. VISCONSI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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17

QUESTION PRESENTED FOR REVIEW

The question presented by the petitioner is as follows:

> Does the requirement that the plaintiff in a civil RICO action allege a "pattern of racketeering activity" require that the plaintiff show injury from each act of racketeering activity in the pattern?

AMENDMENT TO LIST OF PARTIES

No appearance by counsel was made on behalf of either Sea/Mountain Resorts, Inc. or John Does 1-10.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

AMENDMENT TO LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF THE ARGUMENT 1

REASONS FOR DENYING THE WRIT 2

I. The Sixth Circuit explicitly did not require the plaintiff to show injury from each act of racketeering activity in the "pattern of racketeering activity" 2

II. The Court of Appeals decision can be supported without reaching the issue presented by the petitioner because of the petitioner's failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b) 4

III. The "relationship test" applied by the Sixth Circuit Court of Appeals is consistent with United States Supreme Court precedent 5

IV. The Sixth Circuit's decision is not in conflict with other courts of appeal 8

CONCLUSION 12

TABLE OF AUTHORITIES

Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989) 7

Banks v. Wolk, 918 F.2d 418 (3d Cir. 1990) 8

Durham v. Business Management Asscciates, 847 F.2d 1505 (11th Cir. 1988) 9

H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 3,5,6,7,9

Kerr-McGee Refining Corporation v. M/T Triumph, 924 F.2d 467 (2d Cir. 1991) 10

Marshall v. Ilsley Trust Co. v. Pate, 819 F.2d 806 (7th Cir. 1987) 11

NLRB v. Pittsburgh SS Co., 340 U.S. 498 (1951) 8

Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263 (3d Cir. 1987) 9

United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) 10

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991) 10,11

Statute

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.* (RICO) ..... *passim*

Rules

Fed. R. Civ. P. 9(b) 4

Fed. R. Civ. P. 12(b) 4

No. 91-2084

IN THE

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October Term, 1991

JOHN VILD,
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vs.

DOMINIC A. VISCONSI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Sixth Circuit explicitly states, in its opinion in this case, that it did ". . . not hold that a civil RICO plaintiff must necessarily be directly harmed by all the alleged predicate acts. . . ." App. 25[1] Yet the petitioner presents this as the issue for decision by this Court. As the Opinion of the Sixth Circuit Court of Appeals does not present this issue, the petition for certiorari should be denied.

The court of appeals' decision is consistent with the decisions of this Court. In *H. J., Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229 (1989), this Court described the two-pronged test of relationship and continuity. The court of appeals applied this test in reaching its decision. Since the Sixth Circuit followed United States Supreme Court precedent, the petition for a writ of certiorari should be denied.

The petition should also be denied because the court of appeals limited its holding to the unusual facts of this case. The facts in this case do not raise a significant, unsettled issue which requires consideration by this Court.

The petition should be denied because the court of appeals' decision is not in direct conflict with those of other courts of appeal. Like the Sixth Circuit, other courts of appeal have applied the so-called "relationship" test in determining whether a pattern exists. Since the decision of the Sixth Circuit Court of Appeals is not in conflict with the other courts of appeal decisions, the writ should be denied.

---

[1] References to the opinion of the Court of Appeals for the Sixth Circuit are to the Appendix to the petitioner's brief.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit explicitly did not require the plaintiff to show injury from each act of racketeering activity in the "pattern of racketeering activity."

The petitioner, in articulating the question presented by this case, has stated the issue as follows:

> Does the requirement that the plaintiff in a civil RICO action allege a "pattern of racketeering activity" require that plaintiff show injury from each act of racketeering activity in the pattern?

Petitioner contends that the Court of Appeals for the Sixth Circuit held in the affirmative on this issue. In fact, the court of appeals held as follows:

> We do not hold that a civil RICO plaintiff must necessarily be directly harmed by all of the alleged predicate acts, because harm from one enumerated violation may, in certain situations, be sufficiently connected. App. 25-26.

The question presented by the petitioner, therefore, is not presented by this case. In fact, the court of appeals' opinion explicitly states that it does not suggest such a rule. This alone should be sufficient to deny the petition for certiorari.

Further, the court of appeals specifically limited its holding to the facts in this case. At 26 it held as follows:

> Our conclusion merely reflects that *this* plaintiff, under the circumstances of *this* case, may not use unrelated predicate acts that allegedly may have harmed ultimate purchasers or other third parties not similarly situated to the plaintiff (Emphasis added).

This case involves unique facts where the petitioner claimed that one type of conduct, injurious to himself, was related to a second type of conduct, injurious to others, and that he had been precluded from participating in the second type of conduct. The court of appeals, at 26, concluded that because of these unusual facts his cause of action "failed the relationship test" of *H. J., Inc. Id.*

The question presented by the petitioner was not decided adversely to the petitioner. Rather, the court explicitly held that it would not make such a rule in this case. It held only that, under the unique facts presented by this case, a relationship between two types of conduct was not alleged.

II. The Court of Appeals decision can be supported without reaching the issue presented by the petitioner because of the petitioner's failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b).

The court of appeals, at 26-27, held that the proffered third amended complaint and its predecessors, filed by the petitioner "... failed to plead fraud with particularity under Fed. R. Civ. P. 9(b)." With respect to the second type of conduct, that is conduct directed at non-plaintiffs, the court held that the petitioner failed to allege "times, places, contents and victims of the underlying fraud." *Id.*, at 26. Therefore, even if it were ultimately determined that the two types of conduct were sufficiently related to allege a RICO violation, the court of appeals properly held that the case should be dismissed, under Rule 12(b) and Rule 9(b) of the Federal Rules of Civil Procedure, for failure to allege fraud with particularity for purposes of supporting the predicate acts of the second type of conduct.

As a result, if this Court were to grant petitioner's writ and determine that a relationship and continuity existed for purposes of stating a civil RICO action, the petitioner's pleadings would still be fatally deficient for failure to plead fraud with particularity. Respondents submit that the court of appeals' decision is correct with respect to the analysis of the civil RICO statute, however, its conclusion can be reached without the necessity of determining the petitioner's issue. Accordingly, the petition should be denied.

III. The "relationship test" applied by the Sixth Circuit Court of Appeals is consistent with United States Supreme Court precedent.

The Court of Appeals for the Sixth Circuit held that there must be a relationship between the predicate acts for there to be a "pattern of racketeering activity." The Sixth Circuit reached this conclusion by utilizing the test articulated in *H. J., Inc., supra*, and held, "the plaintiff may satisfy the relationship requirement if the predicate acts alleged 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' *Id.*, at 2901." App. 19-20. In affirming the district court's order dismissing petitioner's complaint, the Sixth Circuit essentially found that the petitioner's allegations, which amounted to a breach of contract, constituted an "isolated event" within the meaning of *H. J., Inc.* The Sixth Circuit also held that petitioner's allegations demonstrated *dissimilar* purposes, results, participants, victims and methods of commission from the other alleged predicate acts. Therefore, the Sixth Circuit affirmed the district court's dismissal of petitioner's RICO allegations by applying the teachings of this Court.

The Sixth Circuit applied the *H. J., Inc.* test elements to distinguish between the alleged acts directed at the petitioner, salesman, and the alleged acts directed at third-party customers. Petitioner, hired to market time-share interests on behalf of the defendants, alleged that one of the defendants, C. W. Sattenfeld, fraudulently induced him to enter into the marketing agreement. This was the first type of predicate act.

The second type of predicate act involved alleged improprieties by the defendants directed at ultimate purchasers of the real estate interests. These allegations focused on wire and mail fraud resulting from technical violations of statutory law, including misrepresentations about the status of one of the defendant business entities and the use of illegal real estate contracts in Florida. Unlike the allegations of threat and intimidation with respect to the salesman, the allegation with respect to the customers involved technical violations.

The Sixth Circuit found that the two types of conduct had "distinct and dissimilar 'purposes, results, participants, victims, or methods of commission.' *H. J., Inc.*, 109 S. Ct. at 2901." App. 22. The purposes were different because the petitioner alleged that the defendants' purpose with respect to him, the salesman, was to force him out of business and the defendants' purpose with respect to the third-party customers was to induce them to purchase time-share units. The results were disparate because the first line of activities resulted in the petitioner's association with the defendants in a marketing agreement, and the second line of conduct resulted in individuals attending sales meetings and perhaps acquiring time-share interests. The victims were different because the first line of conduct was directed to a salesman, the second line of conduct was directed to customers.

The Sixth Circuit, at page 24, emphasized that the petitioner was:

> the *only victim* of the threats, extortion and fraud perpetrated with regard to the failed marketing agreement. He alleges no activity directed against anyone in his position. . . . The plaintiff was never an ultimate purchaser of real estate interests, and never

> sought to be a customer or owner of the Club or Longboat. Plaintiff does not come to the court as an innocent purchaser of Florida swampland who was hoodwinked by the fast-talking defendants. He cannot complain about harm to these other persons or any state agency.... The plaintiff sues the defendants because he could not sell real estate interests, as he planned and contracted to do, to ultimate purchasers, the alleged victims of the conduct which the plaintiff now cites as related predicate acts under RICO.

The Sixth Circuit also found differing methods of commission. The Sixth Circuit held that the alleged methods of commission used, wire and mail fraud, were used by "happenstance." *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278 (7th Cir. 1989). Therefore, the Sixth Circuit found that there was no relationship as contemplated by *H. J. Inc.* and therefore no pattern of racketeering activity. Accordingly, the Sixth Circuit Court of Appeals affirmed the dismissal of the RICO count by applying the test articulated by this Court.

IV. The Sixth Circuit's decision is not in conflict with other courts of appeals.

Certiorari may be granted only in cases where there is a real conflict of opinion and authority between courts of appeal. *NLRB v. Pittsburgh SS Co.*, 340 U. S. 498 (1951). The petitioner acknowledges that the Fifth Circuit and the District of Columbia Circuit are in agreement with the Sixth Circuit. However, the petitioner argues that the Second Circuit, the Third Circuit, the Seventh Circuit and the Eleventh Circuit are in conflict with the Sixth Circuit. To the contrary, the Sixth Circuit is not in a real conflict with the other circuits as contemplated by *NLRB, supra.* The Sixth Circuit is, in fact, in accord with such other circuits.

(1) *The Sixth Circuit is Not in Conflict with the Third Circuit.*

The petitioner argues that *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990) is representative of the Third Circuit position. The petitioner states that *Banks* held that the plaintiff need not demonstrate injury by more than one predicate act. The petitioner then argues that there exists conflict among the circuits because the Sixth Circuit requires injury by each act. The Sixth Circuit did not state that a plaintiff must be injured by more than one predicate act. Rather, the Sixth Circuit held that the predicate act which injures a plaintiff must be related to the predicate act which injures a separate party. Such relatedness was found to exist in *Banks* because there was a *common purpose* which the predicate acts were designed to achieve with respect to the plaintiff and other victims, to wit, to obtain a lower price for the purchase of a building. In the present case, there is no such *common purpose.*

Like the Sixth Circuit, the other Third Circuit case cited in petitioner's brief, *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263 (3d Cir. 1987), required similar purposes and methods of operation. *Town of Kearny* found that two sets of victims suffered from the same conduct which amounted to illegal bribes. Accordingly, the conduct related to both sets of victims. In the present case, the conduct alleged by the salesman, intimidation, is wholly different from the conduct of technical violations alleged with respect to the customers.

(2) *The Sixth Circuit is not in Conflict with the Eleventh Circuit.*

The Sixth Circuit decision in the present case is not in conflict with the Eleventh Circuit decision in *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988). In *Durham*, a pre-*H. J., Inc.* case, the court held that, "the use of business instructional video cassette tapes, the alleged promises of tax benefits and alleged inflated appraisals which lead to IRS denial of tax benefits create a degree of similarity between the two schemes." *Id.*, at 1512. The schemes were designed to obtain investors, albeit in different investments. There is no such commonality or relationship between the schemes and victims in the present case. The alleged scheme with respect to the customer was to sell time-share interests without strict compliance with technical statutory requirements. The alleged scheme with respect to the salesman was to intimidate the salesman. The victims were also different, unlike the investors in *Durham*. The plaintiff in the present case was a salesman. All other alleged victims were potential customers.

(3) *The Sixth Circuit is not in Conflict with the Second Circuit.*

As in *Kerr-McGee Refining Corporation v. M/T Triumph*, 924 F.2d 467 (2d Cir. 1991), the Sixth Circuit did not require that the plaintiff be injured by every predicate act. Rather, both the Sixth and Second Circuits require a relationship between the predicate acts constituting the pattern.

Similarly, the Second Circuit in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), found that the methods of commission, goals, participants and victims were similar in the murders committed for the "facilitation of the desired change in leadership of the Bonnano crime family." In the present case, there was no such common goal. The alleged goal with respect to the plaintiff was to force him out of the marketing agreement. The alleged goal with respect to the customers was to sell time-share interests.

(4) *The Sixth Circuit is not in Conflict with the Seventh Circuit.*

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991), used a similar analysis to that of the Sixth Circuit in the present case. As in the present case, there were different victims in *Masters*. One set of victims consisted of individuals fraudulently induced to do business with the defendants. Another victim was the murdered wife of one of the defendants. The Seventh Circuit used the "relationship" test to find that the enterprise employed the same cover-up and bribery methods of commission with regard to the murder as it did with regard to the business fraud. *Masters* held that the murder could not have occurred in the manner that it did without the enterprise's expertise in bribery and cover-up. The court stated:

> [An] effective criminal organization was in place ready to respond effectively by planning and carrying out a detection-proof crime [the murder] that would have been beyond the capacities of the individual defendants acting either singly or without the aid of their organizations. *Id.*, at 1367.

In *Masters*, the murder could not have occurred in the fashion it did without the same participants and methods of commission used in the rest of the pattern of racketeering activity. The court found a relationship existed.

In the present case, the isolated telephone call and fax transmission by one of the defendants did not require the same methods of commission and participants that were allegedly employed against the customers. The alleged intimidation with respect to the plaintiff was not related to the alleged technical statutory violations regarding the customers. Unlike *Masters*, the allegations regarding the plaintiff could have occurred regardless of the alleged methods of commission with respect to the customers. Therefore, there was no relationship of predicate acts for purposes of establishing a pattern.

Nor does *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987), conflict with the Sixth Circuit ruling in the present case. In *Marshall*, all of the victims were investors. As discussed above, the petitioner, as salesman, was an entirely different type of "victim" than any other alleged victim.

No conflict among the circuits exists with respect to this case. The Sixth Circuit's opinion is consistent with the other circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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